

1 DAVID D. LAWRENCE, State Bar No. 123039
dlawrence@lbaclaw.com
2 DENNIS M. GONZALES, State Bar No. 59414
dgonzales@lbaclaw.com
3 NATHAN A. OYSTER, State Bar No. 225307
noyster@lbaclaw.com
4 LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
5 Glendale, California 91210-1219
Telephone No. (818) 545-1925
6 Facsimile No. (818) 545-1937

7 Attorneys for Defendant
Burbank Police Department Officer Gunn
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 PRESTON SMITH, an individual;

13 Plaintiff,

14
15 vs.

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
BURBANK POLICE DEPARTMENT
18 OFFICER GUNN; BURBANK
POLICE DEPARTMENT OFFICER
19 BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
20 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE
21

22 Defendants.
23

Case No. CV 10-08840 R (AGRx)

Honorable Manuel L. Real

**OFFICER GUNN'S
MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

Trial: July 10, 2012

Time: 9:00 a.m.

Courtroom: 8

Pretrial Conf.: June 11, 2012

Time: 11:00 a.m.

Courtroom: 8

24 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR COUNSEL
25 OF RECORD:

26 ///

27 ///

28 ///

1 Defendant OFFICER NEIL GUNN, JR. (hereinafter "Officer Gunn")
2 hereby submit the following Memorandum of Contentions of Fact and Law.

3
4 Dated: May 21, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

5
6
7 By /s/ Nathan A. Oyster
Nathan A. Oyster
8 Attorneys for Defendant
Burbank Police Department Officer Gunn
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 On April 10, 2009, Plaintiff Preston Smith (hereinafter "Plaintiff") was
4 being questioned by Burbank Police Department Officers, including Officer
5 Gunn, near a liquor store in the City of Burbank. While being questioned and
6 during lawful detention, Plaintiff ran away from Officer Gunn despite orders to
7 stop.

8 Officer Gunn was able to apprehend Plaintiff, but faced resistance from
9 Plaintiff. As Officer Gunn attempted to lawfully restrain and detain Plaintiff,
10 Plaintiff used his elbows and clinched his hands in a fist to strike Officer Gunn
11 and also flailed his arms and kicked his legs.

12 Plaintiff alleges that Officer Gunn deployed his taser against Plaintiff
13 multiple times, even after Plaintiff stopped struggling. Further, Plaintiff alleges
14 that Officer Gunn used his flashlight on Plaintiff.

15 To date, limited discovery has been conducted due to the case having been
16 stayed for over a year. Prior to trial, Officer Gunn intends to file a Motion for
17 Summary Judgment as to all of Plaintiff's claims.

18 **II. OFFICER GUNN'S CONTENTIONS OF FACT AND LAW.**

19 **A. Plaintiff's Claims [L.R. 16-4.1(a)].**

20 Plaintiff has alleged the following four claims against Officer Gunn: (1) a
21 violation of Plaintiff's Fourth Amendment rights pursuant to 42 U.S.C. § 1983,
22 (2) violation of California Civil Code § 52.1 (the "Bane Act"), (3) intentional
23 infliction of emotional distress, and (4) assault and battery.

24 **B. Elements of Plaintiff's Claims [L.R. 16-4.1(b)].**

25 **1. Fourth Amendment Violation Under 42 U.S.C. § 1983.**

26 Plaintiff must establish the following elements to prevail on his Fourth
27 Amendment violation claim based upon excessive force:

- 28 1. Officer Gunn was acting under the color of law; and

1 2. Officer Gunn deprived Plaintiff of his Fourth Amendment rights by
2 using force against Plaintiff that was not objectively reasonable.
3 *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007).

4 **2. California Civil Code § 52.1.**

5 Plaintiff must establish the following elements to prevail on his California
6 Civil Code § 52.1 claim:

- 7 1. Officer Gunn violated Plaintiff's rights under state or federal law;
8 and
9 2. Officer Gunn interfered with Plaintiff's rights through threats,
10 intimidation or coercion.

11 *See* Cal. Civ. Code § 52.1(a); *Barsamian v. City of Kingsburg*, 597 F.Supp.2d
12 1054 (E.D. Cal. 2009).

13 **3. Intentional Infliction Of Emotional Distress.**

14 Plaintiff must establish the following elements to prevail on his state law
15 claim for intentional infliction of emotional distress:

- 16 1. Officer Gunn engaged in outrageous conduct;
17 2. Officer Gunn intended to cause, or reckless disregard of the
18 probability of causing, emotional distress;
19 3. Plaintiff suffered severe emotional distress; and
20 4. Officer Gunn's outrageous conduct was the actual and proximate
21 causation of Plaintiff's emotional distress.

22 *Wong v. Tai Jing*, 189 Cal.App.4th 1354, 1376 (2010); *Hughes v. Pair*, 46 Cal.4th
23 1035, 1050 (2009); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1001
24 (1993).

25 **4. Assault And Battery.**

26 Plaintiff must establish the following element to prevail on his assault and
27 battery claim:

- 28 1. Officer Gunn used unreasonable force against Plaintiff.

1 *Nelson v. City of Davis*, 709 F.Supp.2d 978, 992 (E.D. Cal. 2010); *Edson v. City*
2 *of Anaheim*, 63 Cal.App.4th 1269, 1272 (1998).

3 **C. Key Evidence Opposing Plaintiff's Claims [L.R. 16-4.1(c)].**

4 **1. Fourth Amendment Violation Under 42 U.S.C. § 1983.**

5 The key testimony opposing Plaintiff's Fourth Amendment excessive force
6 claim will be the testimony of Burbank Police Department personnel, including
7 Officer Gunn, Officer Baumgarten, Officer Edwards, and Officer Rodriguez.
8 Officer Gunn will also rely upon expert witness testimony.

9 The key evidence opposing Plaintiff's Fourth Amendment excessive force
10 claim is information contained as part of the criminal record of *People v. Preston*
11 *Smith*, Los Angeles Superior Court Case No. 9BR01353. Officer Gunn will also
12 rely upon Plaintiff's previously filed declaration in this civil matter, government
13 claim for damages with all attachments, as well as Plaintiff's responses to
14 discovery and relevant medical records.

15 **2. California Civil Code § 52.1.**

16 The key testimony opposing Plaintiff's California Civil Code § 52.1 claim
17 will be the testimony of Burbank Police Department personnel, including Officer
18 Gunn, Officer Baumgarten, Officer Edwards, and Officer Rodriguez. Officer
19 Gunn will also rely upon expert witness testimony.

20 The key evidence opposing Plaintiff's California Civil Code § 52.1 claim is
21 information contained as part of the criminal record of *People v. Preston Smith*,
22 Los Angeles Superior Court Case No. 9BR01353. Officer Gunn will also rely
23 upon Plaintiff's previously filed declaration in this civil matter, government claim
24 for damages with all attachments, as well as Plaintiff's responses to discovery and
25 relevant medical records.

26 **3. Intentional Infliction Of Emotional Distress.**

27 The key testimony opposing Plaintiff's intentional infliction of emotional
28 distress claim will be the testimony of Burbank Police Department personnel,

1 including Officer Gunn, Officer Baumgarten, Officer Edwards, and Officer
2 Rodriguez. Officer Gunn will also rely upon expert witness testimony.

3 The key evidence opposing Plaintiff's intentional infliction of emotional
4 distress claim is information contained as part of the criminal record of *People v.*
5 *Preston Smith*, Los Angeles Superior Court Case No. 9BR01353. Officer Gunn
6 will also rely upon Plaintiff's previously filed declaration in this civil matter,
7 government claim for damages with all attachments, as well as Plaintiff's
8 responses to discovery and relevant medical records.

9 **4. Assault And Battery.**

10 The key testimony opposing Plaintiff's assault and battery claim will be the
11 testimony of Burbank Police Department personnel, including Officer Gunn,
12 Officer Baumgarten, Officer Edwards, and Officer Rodriguez. Officer Gunn will
13 also rely upon expert witness testimony.

14 The key evidence opposing Plaintiff's assault and battery claim is
15 information contained as part of the criminal record of *People v. Preston Smith*,
16 Los Angeles Superior Court Case No. 9BR01353. Officer Gunn will also rely
17 upon Plaintiff's previously filed declaration in this civil matter, government claim
18 for damages with all attachments, as well as Plaintiff's responses to discovery and
19 relevant medical records.

20 **D. Officer Gunn's Affirmative Defenses [L.R. 16-4.1(d)].**

21 Officer Gunn asserts the following affirmative defenses: (1) qualified
22 immunity; (2) comparative negligence; (3) section 1983 claim barred under *Heck*
23 *v. Humphrey* since the claim calls a criminal conviction into question; (4) failure
24 to mitigate damages; (5) doctrine of unclean hands; (6) Government Code §
25 845.8; (7) self-defense; (8) failure to comply with the timing requirements of the
26 California Government Claims Act; and (9) Government Code § 820.2.

27 ///

28 ///

1 **E. Elements of Officer Gunn's Affirmative Defenses [L.R. 16-**
2 **4.1(e)].**

3 Officer Gunn must establish the following elements to prevail on his
4 affirmative defense that he is entitled to qualified immunity:

- 5 1. Plaintiff's constitutional rights were not violated; or
- 6 2. Officer Gunn did not violate a clearly established constitutional
7 right.

8 *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011).

9 Officer Gunn must establish the following elements to prevail on his
10 comparative negligence affirmative defense:

- 11 1. Plaintiff was negligent; and
- 12 2. Plaintiff's negligence was a substantial factor in causing his injuries.

13 CACI 407; *Atkins v. Strayhorn*, 223 Cal.App.3d 1380, 1395 (1990).

14 Officer Gunn must establish the following elements to prevail on his
15 affirmative defense that Plaintiff's section 1983 claim is barred under *Heck v.*
16 *Humphrey* since the claim calls into question Plaintiff's previous criminal
17 conviction:

- 18 1. Judgment in favor of Plaintiff's section 1983 suit would necessarily
19 imply the invalidity of Plaintiff's conviction; and
- 20 2. Plaintiff's criminal conviction has not been reversed, expunged,
21 declared invalid, or called into question.

22 *Heck v. Humphrey*, 512 U.S. 477, 486-487, 114 S.Ct. 2364 (1994); *Hooper v.*
23 *County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011).

24 Officer Gunn must establish the following elements to prevail on his failure
25 to mitigate damages affirmative defense:

- 26 1. Plaintiff could have avoided certain damages with reasonable efforts
27 or expenditures.

28 CACI 3930; *Green v. Smith*, 261 Cal.App.2d 392, 396 (1968).

1 Officer Gunn must establish the following elements to prevail on his
2 doctrine of unclean hands affirmative defense:

- 3 1. Plaintiff's conduct is inequitable; and
 - 4 2. Plaintiff's conduct relates to the subject matter of its claims.
- 5 *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987).

6 Officer Gunn must establish the following elements to prevail on his
7 Government Code § 845.8 affirmative defense:

- 8 1. Plaintiff resisted arrest; and
- 9 2. Plaintiff caused the injury.

10 Cal. Gov't. Code § 845.8; *see Kisbey v. State of California*, 36 Cal.3d 415, 419
11 (1984).

12 Officer Gunn must establish the following elements to prevail on his
13 affirmative defense that he acted in self-defense:

- 14 1. Officer Gunn honestly and reasonably believed that Plaintiff was
15 about to inflict harmful or offensive contact upon him; and
 - 16 2. Officer Gunn used reasonable force while acting in self-defense.
- 17 BAJI 7.55; *see Boyer v. Waples*, 206 Cal.App.2d 725, 727 (1962); *see also Edson*
18 *v. City of Anaheim*, 63 Cal.App.4th 1269, 1273 (1998).

19 Officer Gunn must establish the following elements to prevail on his failure
20 to comply with the statute of limitations of the California Government Claims Act
21 affirmative defense:

- 22 1. Plaintiff failed to timely submit a Government Claim for his state
23 law claims; and/or
- 24 2. Plaintiff failed to file a Complaint within six months of the rejection
25 of Plaintiff's Government Claim.

26 Cal. Gov't. Code §§ 945.4, 945.6.

27 Officer Gunn must establish the following elements to prevail on his
28 affirmative defense pursuant to Government Code § 820.2:

- 1 1. Officer Gunn's actions or omissions were the result of the exercise
- 2 of the discretion vested in him; and
- 3 2. Plaintiff was injured from Officer Gunn's actions or omissions.
- 4 Cal. Gov't. Code §820.2.

5 **F. Key Evidence In Support Of Officer Gunn's Affirmative**

6 **Defenses [L.R. 16-4.1(f)].**

7 The key testimony in support of Officer Gunn's affirmative defenses will

8 be the testimony of Burbank Police Department personnel, including Officer

9 Gunn, Officer Baumgarten, Officer Edwards, and Officer Rodriguez. Officer

10 Gunn will also rely upon expert witness testimony.

11 The key evidence in support of Officer Gunn's affirmative defenses is

12 information contained as part of the criminal record of *People v. Preston Smith*,

13 Los Angeles Superior Court Case No. 9BR01353. Officer Gunn will also rely

14 upon Plaintiff's previously filed declaration in this civil matter, government claim

15 for damages with all attachments, as well as Plaintiff's responses to discovery and

16 relevant medical records.

17 **G. Similar Statements For All Third Parties [L.R. 16-4.1(g)].**

18 No similar statements are anticipated by any third parties to this matter.

19 **H. Anticipated Evidentiary Issues [L.R. 16-4.1(h)].**

20 Officer Gunn plans to exclude evidence related to his personnel file and

21 prior "bad acts" pursuant to the Official Information Privilege, California Penal

22 Code § 832.5 *et seq.*, and California Evidence Code §1040 *et seq.* on the basis

23 that such evidence is not relevant to the subject matter of this litigation and

24 violates the right to privacy. Although motions *in limine* have not been filed in

25 this matter, Officer Gunn intends to address these evidentiary issues in his

26 forthcoming trial brief.

27 ///

28 ///

1 **I. Key Legal Issues [L.R. 16-4.1(i)].**

2 The key legal issue is whether the force used by Officer Gunn was
3 reasonable. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d
4 443 (1989). Based on the available facts and evidence in this case, Officer Gunn
5 applied reasonable force on an incremental and as-needed basis. Plaintiff's
6 repeated failure to abide by Officer Gunn's commands warranted Officer Gunn's
7 actions given the threat Plaintiff posed to Officer Gunn and the general public.

8
9 Dated: May 21, 2012

LAWRENCE BEACH ALLEN & CHOI, PC

10
11
12 By /s/ Nathan A. Oyster
13 Nathan A. Oyster
14 Attorneys for Defendant
15 Burbank Police Department Officer Gunn
16
17
18
19
20
21
22
23
24
25
26
27
28